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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

IN RE  
HAWAII FEDERAL ASBESTOS CASES )  
This Document Applies To: )  
MERCY S. BYINGTON, individually and )  
as Personal Representative of the Estate of )  
JIMMY F. BYINGTON, deceased, )  
EVELINE SHORT, and )  
BEVERLY ANN HAUOLI ANI, as )  
Prochein Ami for MARGARET BARBARA )  
HA'EIHA'E ANI, a minor, )  
Plaintiffs, )  
vs. )  
UNITED STATES OF AMERICA, )  
DEFENDANT UNITED STATES OF  
AMERICA'S CONCISE STATEMENT OF  
FACTS IN SUPPORT OF ITS MOTION  
FOR SUMMARY JUDGMENT;  
EXHIBITS "A" THROUGH "H";  
CERTIFICATE OF SERVICE

**DEFENDANT UNITED STATES OF  
AMERICA'S CONCISE STATEMENT OF FACTS IN SUPPORTS OF ITS  
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Rule 56.1, of the Local Rules of Practice for the United States District Court for the District of Hawaii, defendant United States of America hereby submits its concise statement of material facts in support of its motion for summary judgment.

|    | Factual Description   | Reference(s)   |
|----|---|--|
| 1. | Hickam AFB is a federal facility owned by the Department of Defense.  | U.S. Exh. B at p. 1.   |
| 2. | Plaintiff Jimmy Byington was employed by the State of Hawaii at all times that he worked in HIANG facilities on Hickam AFB.   | Compl. at ¶ 12, U.S. Exh. A.   |
| 3. | Byington's alleged exposure to asbestos at Hickam AFB occurred, if at all, in buildings 3400B, 3427, 3416, 3426 and 3415.   | Compl at ¶ 6.  |
| 4. | All of these buildings were licensed to decedent's employer for use by the HIANG at all times relevant to this claim.   | U.S. Exh. B at pp. 1-10; U. S. Exh. D, Declaration of Ms. Lei Lum, pp. 1-2.          |
| 5. | The facilities were licensed based on statutory and regulatory authority set forth in 32 U.S.C. §503, and Air Force regulations, AFI 32-9003 and Air Force Regulation 87-3.                                   | U.S. Exh. G, Air Force Instruction 32-9003, ¶¶ 1.1, 3.1, 3.5., Decl. Of Lei Lum, ¶5. |
| 6. | The initial licensing agreement between the USAF and the HIANG for use of Hickam AFB facilities was executed in November 1975, and continues in effect today, as modified by various supplemental agreements. | U.S. Exh. B at pp. 1-10; U. S. Exh. D, Declaration of Ms. Lei Lum, pp. 1-2.          |

|   |     |  |  |
|---|-----|--|--|
| 1 | 7.  | During the relevant time asserted in Byington's federal complaint -- from 1989 to 1993 -- the terms of the November 1975 license agreement controlled the allocation of responsibility for maintenance of the facilities, and safety of employees. | U.S. Exh. B at pp. 1-10; U. S. Exh. D, Declaration of Ms. Lei Lum, pp. 1-2.  |
| 2 | 8.  | The USAF-HIANG licensing agreement in effect during the time in which Byington worked for the HIANG imposed upon the HIANG responsibility for the maintenance and repair of the licensed premises.   | U.S. Exh. B, USAF-HIANG License Agreement dated November 11, 1975, paragraph 2.  |
| 3 | 9.  | USAF did not assume any responsibility for the safety of HIANG's state employees.  | U. S. Exh. D, Declaration of Ms. Lei Lum, pp. 1-2.   |
| 4 | 10. | The state of Hawaii and the HIANG assumed the responsibilities as set forth in the 1975 facilities license agreement executed by the USAF and HIANG.   | U. S. Exh. F, Decl. Of Col. Mike Compton at pp. 1-2.   |
| 5 | 11. | The HIANG developed and implemented an asbestos management program that covered the buildings at Hickam AFB licensed to the HIANG.   | U.S. Exh. E, "Asbestos Management Program, Hawaii Air National Guard, Hickam Air Force Base, Hawaii," USAF 01-00586-00619; 01-00644-00662.                 |
| 6 | 12. | The HIANG Asbestos Management Program was prepared by the Air National Guard Civil Engineering Technical Services Center, Minot, North Dakota, and issued in early 1992.   | U. S. Exh. F, Decl. Of Col. Mike Compton at pp. 1-2.   |
| 7 | 13. | The program expressly identifies, and applies to, all of the buildings alleged in the Byington complaint as containing asbestos.   | U. S. Exh. F, Decl. Of Col. Mike Compton at pp. 1-2.   |
| 8 | 14. | The HIANG "base asbestos management program consists of an asbestos management plan (AMP) and an asbestos operating plan (AOP) developed for Hickam ANG base and its GSU's and are consistent with AFR 91-42."                                     | U.S. Exh. E at 1, para. 1.1, "Asbestos Management Program, Hawaii Air National Guard, Hickam Air Force Base, Hawaii," USAF 01-00586-00619; 01-00644-00662. |

|    |     |  |   |
|----|-----|--|---|
| 1  | 15. | The “overall objective of the asbestos management program is to ensure that the health and welfare of all base personnel are protected from the potentially harmful effects of asbestos containing material. | U.S. Exh. E at 1, para. 1.2 , “Asbestos Management Program, Hawaii Air National Guard, Hickam Air Force Base, Hawaii,” USAF 01-00586-00619; 01-00644-00662.       |
| 5  | 16. | Any duty to inform Byington about the presence of asbestos in the licensed facilities, and the duty to address any dangers posed by the asbestos in those buildings, rested solely with the HIANG.           | U.S. Exh. E at 1, paras. 2.4, 2.6 , “Asbestos Management Program, Hawaii Air National Guard, Hickam Air Force Base, Hawaii,” USAF 01-00586-00619; 01-00644-00662. |
| 9  | 17. | Prior to 1992, there was no requirement for the HIANG to have a formal program to address asbestos   | U. S. Exh. F, Decl. Of Col. Mike Compton at p. 2, ¶ 5.  |
| 11 | 18. | Prior to 1992, the HIANG actively monitored and tested its facilities for asbestos   | U. S. Exh. F, Decl. Of Col. Mike Compton at p. 2, ¶ 5.  |
| 13 | 19. | By the express terms of the HIANG Asbestos Management Plan, the HIANG was responsible for state worker health and safety while working in the HIANG facilities.  | U. S. Exh. F, Decl. Of Col. Mike Compton at p. 2, ¶ 5.  |
| 16 | 20. | The HIANG provided notice to state employees on the presence of asbestos in HIANG facilities, and also provided training on asbestos safety.   | U. S. Exh. F, Decl. Of Col. Mike Compton at pp. 1-2, ¶ 5.   |
| 19 | 21. | The HIANG monitored and tested the air in the buildings where Byington worked. <u>Id.</u> at p. 2, ¶ 6-7. <u>Id.</u> at ¶ 7.   | U. S. Exh. F, Decl. Of Col. Mike Compton at p. 2, ¶ 6.  |
| 22 | 22. | Of all the asbestos air tests taken, none of the test results ever exceeded, or even came close to exceeding, federal or state maximum contaminant levels.   | U. S. Exh. F, Decl. Of Col. Mike Compton at p. 2, ¶ 7.  |

1 Pursuant to Local Rules of Court 7.5(e) and 56.1(d), for the United States District  
2 Court for the District of Hawaii, I hereby certify that this Concise Statement of Facts does  
3 not exceed the page or word limits of the rule.

4  
5 DATED: September 26, 2006.

Respectfully submitted,

6  
7 PETER D. KEISLER  
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23 Attorneys for Defendant,  
24 United States of America

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

IN RE  
HAWAII FEDERAL ASBESTOS  
CASES } CIVIL NO. 04-00661 REJ-BMK  
} CERTIFICATE OF SERVICE

## This Document Applies To:

MERCY S. BYINGTON, individually and as Personal Representative of the Estate of JIMMY F. BYINGTON, deceased, EVELINE SHORT, and BEVERLY ANN HAUOLI ANI, as Prochein Ami for MARGARET BARBARA HA'EIHAE ANI, a minor,

Plaintiffs,

VS.

UNITED STATES OF AMERICA,

Defendant.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the date and by the method of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

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Served by First-Class Mail:

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Honolulu, Hawaii 96814

DATED: September 26, 2006, at Honolulu, Hawaii.

/s/ Myra Y. Peterson